

1           Q       Did Comcast pass any of that  
2 charge for that 10 to 12-month period through  
3 to consumers during that time period? That  
4 you can point me to?

5           A       When Comcast made a decision that  
6 it did not increase its fees, because cable  
7 companies don't change their rates every  
8 single month. Just like as I used in the  
9 deposition the example of a steak restaurant  
10 doesn't change the price of steak every day  
11 based on the price of beef. And this is very  
12 well known in economics literature about  
13 prices being sticky, and changes only  
14 occurring every so often. So if Comcast knew  
15 at the time that it was making its decision to  
16 take the games that there was a high  
17 probability that they may tier, it's not  
18 surprising as an economist that they'd then  
19 immediately change prices.

20          Q       Will you answer my question now,  
21 that Comcast did not change its price?

22          A       I think I did say no.

1 Q For the 10 to 12 months that it  
2 carried the eight game package with the  
3 surcharge?

4 A Well, they may have changed prices  
5 in January of that year. I think the question  
6 you asked me at my deposition was, when they  
7 actually decided to accept the surcharge, did  
8 they increase prices immediately. And I  
9 answered not at that time.

10 Q Is there any price increase that  
11 Comcast imposed that you have analyzed that is  
12 attributable to its 10 to 12-month carriage of  
13 the eight-game package?

14 A No.

15 Q Have you modeled - this is another  
16 question I asked you at your deposition - have  
17 you modeled how Comcast prices would change if  
18 they had to carry the eight-game package?

19 A Well, economic theory tells us -

20 Q My question is about your model -

21 MR. CARROLL: I object to the  
22 interruption of the witness. We didn't

1 interrupt Dr. Singer.

2 MR. SCHMIDT: I object to  
3 objections -

4 JUDGE SIPPEL: We're off on two  
5 different tracks. Go ahead. Do you  
6 understand the question?

7 THE WITNESS: Yes, I do.

8 BY MR. SCHMIDT:

9 Q My question is, have you  
10 personally modeled how much Comcast would  
11 increase its prices to subscribers if forced  
12 to carry the eight-game package on a higher  
13 tier?

14 A I have not provided a point  
15 estimate of that amount.

16 Q And have you seen such modeling in  
17 any Comcast document that you have looked at?

18 A Of what they would do if they had  
19 to put it on expanded basic as under the  
20 remedy?

21 Q Yes.

22 A The answer is no.

1           Q       Thank you. And you're the Comcast  
2 economist in this case, right?

3           A       Yes, I am.

4           Q       There is no one else coming in to  
5 testify about economics for Comcast, is there?

6           A       No, there is not.

7           Q       Are you aware that Comcast  
8 predicted that their tiering of the NFL  
9 Network would harm the NFL Network?

10          A       Not that I'm aware of.

11          Q       Are you aware that they predicted  
12 it would set off a chain reaction in the  
13 industry?

14          A       Not that I'm aware of.

15          Q       That is not something you knew?

16          A       No.

17          Q       Are you aware that Comcast thought  
18 the threat of that chain reaction would  
19 intimidate the NFL into giving the eight-game  
20 package to Versus instead of to the NFL  
21 Network?

22          A       I think as we heard there were

1 tough negotiators on both sides of this. So,  
2 and they were negotiating in a tough way. But  
3 that is not something I've examined.

4 Q Do you know who Jeff Shell is?

5 A I believe he is an executive at  
6 Comcast.

7 Q He runs the programming division,  
8 right?

9 A I believe that is correct.

10 MR. SCHMIDT: May I approach,  
11 Your Honor?

12 JUDGE SIPPEL: You may.

13 MR. SCHMIDT: I'm approaching  
14 with what has previously been marked as NFL  
15 Enterprises Exhibit No. 101.

16 JUDGE SIPPEL: This is already in  
17 evidence as your 101, is that right?

18 MR. SCHMIDT: Yes, sir.

19 BY MR. SCHMIDT:

20 Q Do you see Mr. Shell's name there?

21 A Yes, I do.

22 Q Have you seen this email before?

1           A       No, I have not.

2           Q       I'm just going to read you. Let  
3 me know if I've read it wrong. I'm going to  
4 start with the second sentence which says -  
5 this is Mr. Shell writing as head of Comcast  
6 programming, right?

7           A       Yes.

8           Q       He says, in the second sentence,  
9 we have the right in our NFL Network  
10 affiliation agreement to tier it if we don't  
11 get this package. It would lose nearly [REDACTED]  
[REDACTED] subs and would set up a chain reaction  
13 in the industry. Did I read that right?

14          A       You read it correctly.

15          Q       I don't think they knew that, and  
16 this may have tipped things in our favor. Did  
17 I read that right?

18          A       Yes, I did.

19          Q       This isn't something Comcast gave  
20 you to take into account when you gave your  
21 opinions in this case?

22          A       I'm not sure what he was

1 mentioning. I have no idea sitting here today  
2 - I wasn't party to this, I have not seen what  
3 Mr. Shell means by this.

4 Q Mr. Orszag, do you remember my  
5 question?

6 A The answer is, it's something - I  
7 had access to the entire record. I -

8 Q Were you given this?

9 MR. TOSCANO: Please let him  
10 finish his answer.

11 MR. SCHMIDT: I'm trying to get  
12 him to answer my question.

13 JUDGE SIPPPEL: Wait, wait. Wait  
14 just a second. What's the question?

15 MR. SCHMIDT: Have you seen this  
16 before?

17 THE WITNESS: I'm not sure if I  
18 have. I've seen a huge volume of documents,  
19 so sitting here today I can't tell you if I  
20 have.

21 BY MR. SCHMIDT:

22 Q Now, Mr. Orszag, you have on prior

1 occasions criticized Comcast, haven't you?

2           A       That is true.

3           Q       In fact you testified before the  
4 FCC on behalf of satellite companies about  
5 Comcast's use of its market power in  
6 Philadelphia, didn't you?

7           A       That is correct.

8           Q       And you testified that the way  
9 Comcast used its market power in Philadelphia  
10 led to higher price in Philadelphia, didn't  
11 you?

12          A       Yes, but we didn't identify why.

13          Q       That's fine, but you did testify  
14 to that, right, yes or no?

15          A       I can't accept what you've  
16 actually said for the following reason. What  
17 we analyzed was that there was an unobserved  
18 factor going on in Philadelphia that we could  
19 not explain, so Comcast prices in Philadelphia  
20 were higher than in other areas, and we could  
21 not explain why.

22                   So the answer is, we did observe a



1 higher price in Philadelphia, but the reason  
2 for it we could not explain. It could be  
3 because they actually offer a higher quality  
4 service there.

5 Q Do you have any reason to think  
6 there is higher quality service there?

7 A We were very explicit in our -  
8 actually I'm assuming you're reading the  
9 actual cover letter from counsel. But you  
10 were very explicit at that time that we did  
11 not - could not identify why that was the  
12 case. We could not identify whether it was  
13 through the anti-competitive reasons or higher  
14 quality reasons.

15 MR. SCHMIDT: Your Honor, may I  
16 approach with another exhibit?

17 JUDGE SIPPEL: Yes, you may.  
18 What are we doing - oh, this one is already  
19 in. O

20 MR. SCHMIDT: This is NFL  
21 Enterprises Exhibit No. 77, also already in  
22 evidence.

1           (Whereupon the aforementioned  
2           document was marked for  
3           identification as Enterprises  
4           Exhibit No. 77.)

5           JUDGE SIPPEL:   NFL 77.  It looks  
6 to me like it's a report on a study you did,  
7 Mr. Orszag, or an article that you wrote?

8           THE WITNESS:   Yes, it is.

9           JUDGE SIPPEL:   Economic  
10 assessment of the exclusive contract  
11 prohibition.  You can clearly integrate cable  
12 operators and programmers.  You may proceed  
13 now, Mr. Schmidt.

14           BY MR. SCHMIDT:

15           Q       I think the judge has already  
16 established the foundation for you, but this  
17 is your article?

18           A       Yes, it is.

19           Q       Or rather it's a submission you  
20 made to the FCC.

21           A       It is.

22           Q       And you stand behind it, right?

1           A       Based on the information available  
2 to me at that time, yes.

3           Q       Sure. That time being, what,  
4 January 2002?

5           A       Yes.

6           Q       Let me just see if I can get into  
7 the record some of the things you said in  
8 here.

9                   Let's look at page 21. And I'm  
10 just going to read the first sentence of the  
11 first full paragraph on this page. Tell me if  
12 I've read it correctly.

13                   One telling example of the  
14 potential dangers associated with allowing  
15 programming exclusivity in the context of  
16 vertically integrated cable systems - Comcast  
17 is a vertically integrated cable system,  
18 right?

19           A       Yes, it is.

20           Q       Is the experience of Comcast's  
21 SportsNet, a channel devoted to Philadelphia  
22 sports programming, right?

1           A       Yes, it is. You read it  
2 correctly.

3           Q       This is you talking about Comcast  
4 sports programming in Philadelphia, right?

5           A       And two co-authors.

6           Q       Fair enough; don't mean to slight  
7 your co-authors.

8           A       Yes, they would like to be  
9 included.

10          Q       Okay. Let's look at page 22, the  
11 first sentence of the second full paragraph.  
12 Comcast's arrangement with SportsNet  
13 illustrates how cable firms can use  
14 exclusivity to gain market share which helps  
15 to lock in subscribers and potentially harm  
16 competition in the future.

17                   Did I read that right?

18          A       Yes, I did.

19          Q       Flip ahead with me if you would to  
20 page 27. Now I'm looking at the bottom of the  
21 page.

22          A       Yes.

1           Q       There is a paragraph that starts  
2 at the bottom of the page and carries over.  
3 While the evidence appears to suggest that DBS  
4 firms contributed to increase programming  
5 diversity, a body of empirical literature  
6 suggests that vertically integrated cable  
7 systems - like Comcast, right?

8           A       Yes.

9           Q       Have favored their own programming  
10 and excluded similar non-integrated  
11 programming.    Have I read that correctly?

12          A       Yes, you did.

13          Q       As the FCC noted cable providers  
14 with large programming interests may unfairly  
15 favor affiliated programming over unaffiliated  
16 programming.

17          A       You forgot the quotation marks,  
18 but -

19          Q       I'm sorry, I didn't mean to leave  
20 out the quotation marks.

21          A       Yes, those were not my words;  
22 those were the FCC's words.

1           Q       Fair enough, and I think you note  
2 that in the sentence.

3           A       Yes.

4           Q       One recent empirical study of  
5 cable system program choices showed that  
6 vertically integrated cable systems exclude  
7 rival services. Is that what you wrote,  
8 correct?

9           A       Yes.

10          Q       And you finish by saying, the  
11 author noted that, quote, TCI bracket now AT&T  
12 broadband bracket and Comcast, comma, two  
13 operators who on the basic shopping service,  
14 QVC, are less likely to carry rival shopping  
15 service, Home Shopping Network, HSN, correct?

16          A       Yes, I did.

17          Q       Were you being paid by Comcast at  
18 the time you wrote this?

19          A       No, I was not.

20                   I should note you left out some  
21 very key parts of this testimony in terms of  
22 how the market has changed. And if I may

1 provide some context -

2           Q       Mr. Orszag, we are really trying  
3 to fly through things. I'd like to ask my  
4 questions. Mr. Toscano will have the  
5 opportunity to use his time the way he sees  
6 fit.

7           A       Sure.

8           Q       Now what I'd like to do is make  
9 sure I understand what your testimony does and  
10 doesn't cover. And I heard you talk about the  
11 NFL Network, your views on the price of the  
12 NFL Network. But I want to make sure what you  
13 did with respect to Versus and the Golf  
14 Channel, or what you didn't do with respect to  
15 Versus and the Golf Channel.

16                   When I asked you in your  
17 deposition you told me I did not analyze how  
18 Comcast carried Golf and Versus as opposed to  
19 how other MVPDs carried those channels. Do  
20 you remember saying that?

21          A       Yes.

22          Q       Okay, and you said you didn't do

1 any analysis of the penetration rate of Golf  
2 and Versus on Comcast versus Golf and Versus  
3 on other channels; is that right?

4           A           That is not precisely what I said  
5 at the time.   What I said was that if you  
6 look at Table A I presented evidence that  
7 showed the penetration rates for Golf and  
8 Versus, but I did not compare the Golf and  
9 Versus penetration rate to the penetration  
10 rates that the other MVPDs carry.  Rather what  
11 I did was, I looked at the penetration rate of  
12 Golf and Versus relative to the penetration  
13 rate of the NFL Network on each.

14           Q           That is not the answer you gave in  
15 your deposition.

16           A           I believe it was because -

17           Q           Well I gave -

18                       MR. TOSCANO:   Please let him  
19 finish.  Your Honor I'd object to these  
20 repeated interruptions by Mr. Schmidt.

21                       JUDGE SIPPEL:   Yes, you are going  
22 to have to slow down a little bit, Mr.



1 Schmidt.

2 MR. SCHMIDT: Sure, Your Honor.

3 JUDGE SIPPEL: I know you are  
4 trying to get through some material, but let's  
5 slow down just a bit.

6 MR. SCHMIDT: Sure.

7 BY MR. SCHMIDT:

8 Q If I can read you from page 48 of  
9 your deposition, and I can go ahead, and pass  
10 it up to you.

11 (Document handed to witness.)

12 JUDGE SIPPEL: You can read it  
13 and see if he needs, if he wants the  
14 transcript. Maybe you can do it without.

15 BY MR. SCHMIDT:

16 Q I asked you - let's see -

17 MR. TOSCANO: And can you let us  
18 know what page you are on?

19 MR. SCHMIDT: I asked you on page  
20 49, line 11, are you relying - I'm going to  
21 take out Mr. Toscano's objection - he did  
22 object - are you relying on any analysis in

1 the penetration rate of Versus and Golf with  
2 Comcast versus other MVPDs in giving your  
3 opinions? And your answer was, no I am not.

4 THE WITNESS: And that's what I  
5 just said now.

6 MR. SCHMIDT: Okay.

7 BY MR. SCHMIDT:

8 Q You told me you hadn't looked at  
9 penetration rates for how Golf and Versus were  
10 carried on Comcast as opposed to other  
11 networks changed over time. Right?

12 A I believe that is correct.

13 Q And you didn't conduct an analysis  
14 of the price that Comcast pays to Versus and  
15 Golf versus the price that other carriers pay  
16 to Versus and Golf, correct?

17 A I'm not sure that's precisely what  
18 I said in my deposition. I think - I thought  
19 I gave some testimony that we did look at -  
20 I did look at the price that various providers  
21 were paying for Versus and Golf relative to  
22 the data that is presented in Kagan.

1                   But if there is something that you  
2 would like me to look at -

3           Q       Kagan is an average, right?

4           A       Yes, it is.

5           Q       My question was, did you compare  
6 the specific price that Comcast pays for  
7 Versus and Golf versus the specific prices  
8 other networks pay?

9           A       No, I did not.

10          Q       And you haven't studied how many  
11 subscribers that other carriers retain or lose  
12 based on their carriage of Versus or Golf,  
13 correct?

14          A       Virtually all of them carry it, so  
15 it's not a study that could be done.

16          Q       That's not how you answered in  
17 your deposition, is it?

18          A       I think I said no in my  
19 deposition, but I just said no.

20          Q       You haven't done a broader study  
21 of how Comcast carries networks with which it  
22 has an affiliation versus networks with which

1 it doesn't have an affiliation, have you?

2           A       No, because I don't believe that's  
3 a relevant standard, from an economic  
4 perspective.

5           Q       Have you studied Comcast channel  
6 items?

7           A       I have looked at Comcast channel  
8 items.

9           Q       Do you have any reason to disagree  
10 with the lineup that Dr. Singer showed, as an  
11 accurate representation of Comcast's channel  
12 lineup here in DC?

13          A       As in Washington, D.C., I have no  
14 reason to disagree with it.

15          Q       Do you have any reason to disagree  
16 with what Mr. Roberts said that it's  
17 representative of Comcast national channel  
18 items?

19          A       I have no reason to disagree with  
20 Mr. Roberts.

21                   JUDGE SIPPEL:    Would you - maybe  
22 this is the wrong witness to ask - but would

1 somebody explain what Versus and Golf - I got  
2 - who produces that material? I thought that  
3 was a production of Comcast.

4 MR. SCHMIDT: That is a  
5 production of Comcast.

6 JUDGE SIPPEL: All right, then if  
7 it's their own production, is there some kind  
8 of a bookkeeping transfer of costs? Why are  
9 you asking about - you were asking about the  
10 prices, right?

11 MR. SCHMIDT: Yes, Your Honor.

12 JUDGE SIPPEL: That Comcast would  
13 pay for its own product?

14 MR. SCHMIDT: Yes. Because the  
15 essence of this claim is that Comcast treats  
16 its product different than how it treats our  
17 product.

18 JUDGE SIPPEL: But why would they  
19 want to pay for their own product? I mean I  
20 know there's a cost and everything.

21 MR. SCHMIDT: They do pay for  
22 their own product.

1 JUDGE SIPPEL: They are paying  
2 themselves?

3 MR. SCHMIDT: Yes, that's how it  
4 works at Comcast, Your Honor.

5 MR. CARROLL: With all due  
6 respect, we will have Comcast witnesses coming  
7 on. Mr. Schmidt's views of how Comcast did it  
8 is not something I readily agree with.

9 JUDGE SIPPEL: Well, I don't want  
10 to - I'm sounding naive perhaps in asking the  
11 question that way, but I have been trying to  
12 follow this in my mind about where these  
13 different units are located. And I had had  
14 that impression right along. So I'll just sit  
15 tight and wait.

16 MR. CARROLL: But Your Honor we  
17 have a witness coming up, hopefully this  
18 afternoon, Mr. Burke, who is the president of  
19 Comcast who can answer these questions.

20 JUDGE SIPPEL: I will patiently  
21 wait.

22 MR. CARROLL: Okay.

1 BY MR. SCHMIDT:

2 Q Do you have an understanding of  
3 the corporate structure of Comcast? And I  
4 don't mean to put you on the spot.

5 A I'm not an expert, but generally  
6 there is a programming division and a cable  
7 division.

8 Q Okay, and sitting on top of them  
9 is Comcast Corps, right?

10 A If you say so, I'm not going to  
11 disagree.

12 Q On one side there is programming?

13 A Yes.

14 Q That's where Versus is?

15 A And Golf.

16 Q And Golf, thank you. And on the  
17 other side there is the cable branch?

18 A Yes.

19 Q And the basis, you understand, of  
20 our claim here is that because of that  
21 relationship, the cable branch is treating its  
22 sister company more favorable than it's

1 treating the NFL Network. You understand that  
2 is our allegation. I understand you disagree  
3 with it, but you understand that is our  
4 allegation, right?

5 A If you say so. It's your  
6 allegation, so I'm not going to disagree with  
7 it.

8 Q As I understand you are responding  
9 to it, right?

10 A I understand that that is your  
11 position.

12 Q Okay.

13 Have you studied Comcast's  
14 carriage of the MLB network?

15 A I am aware that - the MLB channel  
16 just for some background is a channel that I  
17 believe was just recently launched. And it's  
18 a channel that is dedicated to major league  
19 baseball. And my understanding is that  
20 Comcast is launching it effectively on the  
21 digital tier.

22 Q My question is, have you studied



1 it?

2           A       To the extent that I have  
3 considered where they have launched it, yes.

4           Q       You state in your written  
5 testimony that it takes time for networks to  
6 gain a certain level of penetration, right?

7           A       It often does.

8           Q       It takes time for them to reach a  
9 certain number of subscribers; correct?

10          A       If you look back in history it  
11 often takes time for channels to build  
12 subscribership; that is something that is part  
13 of the history of this sector, something that  
14 has been discussed quite extensively in  
15 various FCC reports as well.

16          Q       It didn't take time for the MLB  
17 channel to build subscribers, did it? It  
18 happened right away, didn't it?

19          A       I don't know what their precise  
20 subscribership is across all carriers today.

21          Q       Do you know that it's [REDACTED]?

22          A       I'm not going to disagree with